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Reforming Intellectual Property Law: An Obvious and Not-so-Obvious Agenda: The Stephen Stewart Lecture for 2008

David Vaver^{*}

 Intellectual property

ABSTRACT

Our intellectual property laws suffer from incoherence. Each—copyrights, patents, trade marks, designs, etc.—grew up as if hermetically sealed. Rights overlap; provisions on ownership, term, remedy, transfer, security and user rights differ haphazardly between schemes; the quality of statutory drafting is patchy; and key rights such as those touching trade secrets and mismarketing (passing off) continue to be regulated by common law and equity. The general purpose of this amorphous body of law is to encourage innovation, creativity and the spread of knowledge, but there is little equation between aspiration and achievement. The lecture discusses why correcting these deficiencies matters and suggests that a single integrated code on intellectual property is a project long overdue.

We all have our laundry list of things of what we like and do not like about our intellectual property (IP) laws. I do not propose in this lecture to read mine out and compare it with yours: time is short, and too often one person's defect is another's attraction. I propose instead to examine some structural features of the laws that we take for granted and that I suggest need reform if we want laws that deliver more than a modicum of what they promise. The United Kingdom can achieve many of these reforms itself; for some, it may need first to get international support before running off to Brussels, Geneva or the successor of Doha.

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IP laws are laws that regulate the economy. According to the *Gowers Review of Intellectual Property*, the ideal IP system:

“... creates incentives for innovation, without unduly limiting access for consumers and follow-on innovators. It must strike the right balance in a rapidly changing world so that innovators can see further by standing on the shoulders of giants”.²

Providing incentives for innovation means giving inventors, authors and other knowledge producers a fair chance of reward. A argument of merit might be added: individuals deserve the opportunity of developing personally and gaining economically from the product of their intellectual labour in proportion to their effort; and what is good for the individual is equally (or perhaps proportionately) good for society—Britain’s, Europe’s and beyond. Those who finance and distribute the results of innovation may also deserve the opportunity of receiving a fair reward from making those results available as widely as possible, at the lowest price consistent with that reward. These reasons provide the main public purposes that justify IP law: everything else is special pleading.

In practice, then, IP laws provide a framework for the production, marketing, distribution and use of a vast range and quantity of products and services in our economy. Among the main rights is copyright law, which helps distribute cultural and industrial products: anything from books and art to advertising and computer programs, and a host of things in between, both big and small, that fall under a capacious definition of original artistic, dramatic, musical and literary works. Database rights cover how mainly electronic databases can be used and exploited. Patent law regulates the production and distribution of inventions, from simple improvements in mechanical gadgets to the major advances in health care and telecommunication. Plant breeder rights protect new plant varieties. The law of trade marks and geographical indications regulates what selling symbols can be used and protected to move their producers’ goods and services. The statutes define who gets protected, for how long, and against whom and for what. Although historically the laws were directed at different discrete activities, today much overlap and multiple protection occur, as we shall later see.

Good economic laws must have at least three characteristics: they must be (1) clear; (2) just; and (3) efficient. These features have their intrinsic merits for all laws; they are critical for economic laws if commerce is to proceed as smoothly and predictably as possible. A failure in any aspect is costly and lessens the respect law should attract. The public will pay and be restricted more than it ought in return for the benefits the laws claim to offer it. People will then tend to ignore or avoid the law, and will resent those who support it and who tell them off.

I suggest that our current IP laws fail significantly in all these three aspects. What follows is a sketch of some of the difficulties and what might be done about them.

² *Gowers Review of Intellectual Property* (December, 2006), p.1. Giants are unnecessary in this equation: people only an intellectual centimetre or two taller than the innovator will do.

THE LAW MUST BE CLEAR

If an impartial observer—at least, any non-IP specialist or intelligent lay person with an interest in IP—were to look any collection of the United Kingdom's IP statutes, and the treaties and European directives on which they are based, he or she could not help being amazed by the sheer abundance, complexity and messiness of it all. The exercise recalls Harman L.J.'s encounter in the 1960s with the statutes that regulated compensation for land that was compulsorily acquired for public works. Harman L.J. said the court had had to:

"... wad[e] through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet, but I have, by leaping from tussock to tussock, as best I might, eventually, pale and exhausted reached the other side . . .".³

He might have said the same of our IP laws. One heavily abridged compilation that gathers the IP tussocks runs to 600 pages of statutes, regulations, directives and treaties. That's before one turns to the learned texts that explain the field and add their analysis of judge-made common law and equity to the morass. The succinct *Guidebook to Intellectual Property* which our chairman co-authored with Daniel Alexander and Lindsay Lane runs—or perhaps sprints—to a mere 200 pages; but then its authors call it only "an overview—a feel for the subject" that "[leaves] lots out", including footnotes.⁴ Standard texts—say that of Cornish & Llewelyn, or Bently & Sherman, or MacQueen, Waelde & Laurie's student text⁵—omit less, but all run to more or less 1,000 pages to explain their subject, together with microscopic footnotes and the usual scholarly disagreements inter se on what the law actually is. And even that's all before one picks up the single-subject specialist texts on copyrights or patents or trade marks or designs or trade secrets, which really do sieve the stygian depths.

Why is it so?⁶ One obvious answer is that economic and social life is complex, and laws that reconcile the myriad shifting and competing demands in and among industry and the public must necessarily be complex.

That answer is obvious, and therefore only partly true. Here is what the Royal Commission on Copyright said in 1897 of the then British copyright law. It was:

³ *Davy v Leeds Corp* [1964] 3 All E.R. 390 at 394 CA (Civ Div).

⁴ Jacob, Alexander and Lane, *A Guidebook to Intellectual Property*, 5th edn (2004), p.v.

⁵ L. Bently and B. Sherman, *Intellectual Property Law*, 3rd edn (2009); W. Cornish and D. Llewelyn, *Intellectual Property Law: Patents, Copyright, Trade Marks & Allied Rights*, 6th edn (2007); H. MacQueen, C. Waelde and G. Laurie, *Contemporary Intellectual Property Law & Policy* (2008). Note how nobody writes alone here: everyone needs their hand held by at least one co-confessor.

⁶ To plagiarise the title of Professor Julius Sumner Miller's television series on science some years ago.

“... wholly destitute of any sort of arrangement, incomplete, often obscure, and even when it is intelligible upon long study, it is in many parts so ill-expressed that no one who does not give such study to it can expect to understand it”.⁷

Does that remind you of anything today?

We have progressed much since 1897, at least if prolixity is equated with progress. The terse 37 sections of the Copyright Act of 1911 that responded to the Royal Commission's criticisms metamorphosed into the 51 sections of the Copyright Act 1956 and then ballooned into some 270 sections in the copyright part of the Copyright, Designs and Patents Act 1988 (CDPA), excluding schedules of transitional provisions. Some provisions were admittedly new and reflected advances in technology and fresh developments, but many were not and did not. They were just more verbose, and came with an infuriating new subsection tucked at their end that said that any new provision “correspond[ing]” to a provision in the previous Act “shall not be construed as departing from the previous law merely because of a change of expression”.⁸ So the drafters added another layer of complexity by begging the questions of which new provisions were supposed to correspond to the old ones, and whether their changes were “merely” of expression or something else. No wonder the editors of *Copinger & Skone James on Copyright* faced the CDPA with sentiments depressingly reminiscent of Queen Victoria's Commissioners:

“... [I]t is perhaps unfortunate that a branch of the law, which was already complex enough, will now, with the coming into force of the 1988 Act, become even more complex. Apart from the size of the Act, its change of format and its new provisions, it does not help that some comparatively simple matters have been made more difficult ... The 1988 Act ... may, therefore, well prove to be a nightmare for copyright users and a minefield for copyright practitioners.”⁹

That comment was written at a time when only the first of the European directives on copyright had affected UK copyright law's pristine purity. The continuing onslaught of such directives and regulations has not reduced the nightmares or minefields.

The blame is not just with what sprouts from Brussels. When the United Kingdom enacted the Patents Act of 1977 (PA), British drafters were not content to repeat the contents of the European Patent Convention it was supposed to mirror. Patent law could not possibly be as simple as the English version of the Convention suggested it was. So the PA reorganised the layout of the treaty and paraphrased its language at greater length.

But *traduire c'est trahir*, and so it is for paraphrase, itself a form of translation. First came attempts by lawyers and judges to iron out the linguistic inconsistencies between the PA and the Patent Convention, and then an astonishing revolt. The judges decided they would altogether ignore the PA provisions that supposedly implemented the

⁷ Cmd. 2036 (1897), p.vii.

⁸ CDPA s.172(2).

⁹ Skone James, Mummery, Rayner James and Garnett, *Copinger & Skone James on Copyright*, 13th edn (1991), p.vi.

Convention, and would rely directly on the Convention itself.¹⁰ When the European directives on databases and trade marks came to be implemented into UK legislation, the courts again turned more to the language of the directives themselves than to their implementing UK statutes and regulations—not that the directives were any paragon of clarity. The courts nonetheless took seriously the idea that laws that were supposed to be uniform throughout the EU should be uniformly interpreted, and local drafting quirks should be swept aside.

So our IP laws are not complex merely because their subject is inherently complex. They are complex partly because they have been enacted in needlessly complex ways, and because they are not written to be understood by those who are mainly affected by them. Specialist lawyers and IP professionals are enured to them, like a coalminer becomes enured to the pit. But otherwise the laws are largely incomprehensible to everyone else. They are wordy where they should be terse, and terse where they should be wordy. They say one thing and mean another. They use ordinary words in extraordinary ways that fool even the best of lawyers. They are as far away as can be from T.S. Eliot's "right" phrase and sentence, where "every word is at home,/Taking its place to support the others,/.../The complete consort dancing together".^{10a}

Let me give an example, a routine case that is a microcosm of where our IP laws have gone wrong: *The Case of the Lawyer's Literary Letter*.¹¹ A few years ago, a manufacturer of hi-fi equipment selling under the *Musical Fidelity* registered trade mark terminated the distribution agreement of one of its dealers in York. The dealer nevertheless kept holding himself out as an authorised distributor and activated a website he had earlier created under a domain name that included the words "Musical Fidelity". The usual lawyer's letter arrived from the manufacturer telling the dealer to stop infringing the trade mark and passing himself off as an authorised distributor. He posted most of the document on the website and was then sued for infringing copyright in the letter as well.

The trade mark aspects of the case do not concern us. It is the copyright part that is interesting. The chancery judge before whom the case came was familiar with copyright and quickly found against the defendant. A letter qualified as an "original literary work"; to upload it without authority was to copy or reproduce the work; QED, infringement.

On appeal, things got murkier. One judge with copyright experience also got rid of the point quickly against the defendant, but her non-chancery colleagues were less enthusiastic. Buxton L.J. said he "experienced considerable surprise" to discover (a) that a solicitor's ordinary letter was an "original literary work" and could have copyright at all, and (b) that a recipient acted unlawfully by posting the letter on his website. Wall L.J. added his own *bon mot* on the "vexed question of copyright":

¹⁰ e.g. *Bristol-Myers-Smith v Baker Norton Pharmaceuticals* [1999] R.P.C. 253 Ch D, affd [2001] R.P.C. 1 CA (Civ Div).

^{10a} T.S. Eliot, *Little Gidding*, ll.216–218 and 223.

¹¹ *Musical Fidelity Ltd v Vickers* [2003] F.S.R. 50 CA (Civ Div). The discussion here draws on D. Vaver, "Does the public understand intellectual property law? Do lawyers?" in *Meredith Lectures 2006: Intellectual Property at the Edge: New Approaches to IP in a Transsystemic World* (2007), Ch.1.

"I too was surprised that copyright attached to solicitors' correspondence (though one knows, having read bundles of solicitors' correspondence, that they might sometimes justify being called literary works of fiction)."

Now, to copyright specialists the Case of the Lawyer's Literary Letter involved no vexed question. English law has protected letters for centuries, first under common law copyright and then under the copyright legislation. In copyright jargon, the phrase "original literary work" is parsed thus: "original" just means not copied and involving some minor compositional skill or judgment; "literary" doesn't mean like Charles Dickens or even Barbara Cartland, but just expressed in letters and figures (even the 0s and 1s of computer code qualify as literary); and "work" doesn't mean much at all.¹²

But to ordinary lawyers and even appeal judges who, while not intimate with IP, are intimate with lawyers' letters as the stuff of their daily professional lives, the statutory language was a trap. During decades of practice it had not occurred to them that what they were producing or perusing could sensibly be called an original literary work, because in ordinary English it is not. They accepted the contrary result only because the precedents compelled them to.

What this represents is a failure of communication, paradoxically in a statute that has communication as its central subject-matter and so should be addressed to people it affects, whose business happens to be communication. But if expert communicators such as lawyers are misled, the statute has failed miserably.

The Lawyer's Letter Case is no isolated example. Case law holds that little below a straight line drawn with a ruler can qualify as an original artistic work; that letters far less elaborate than the Lawyer's Letter are protected—three sentences written in commercialese is another one of the venerable precedents¹³; and that while exhibiting a letter in Selfridge's shop window in Oxford Street and putting it on Selfridge's electronic shop window on its website may be functionally the same, they are legally different: the first does not involve making a copy of the letter; the second act does because of the technology of the computer. In copyright law, using one's physical arm is acceptable; using one's electronic arm is not. To experts, the results seem trite and inevitable; to most others, the reasoning that prompts the results on which they are based is not easily understood, especially when the frail reeds of language on which they rest are exposed.

¹² In fact, "original literary work" is an exocentric compound that can mean more or less than the sum of each of "original" and "literary" and "work", just as "dumbbell", in either of its senses—a weight for lifting or an idiot—does not mean a "dumb bell", a mute cast-iron object with a clapper that for some reason cannot or will not be made to ring: *Exxon Corp v Exxon Insurance Consultants Int'l Ltd* [1982] Ch. 119 at 144 CA (Civ Div).

¹³ In *Tett Bros Ltd v Drake & Gorham Ltd* [1928–1935] MacG. Cop. Cas. 492 (Ch, 1934) copyright in the following masterpiece (omitting "Dear Sir" and "Yours etc.") was held to be infringed:

"Further to the writer's conversation with you of to-day's date, we shall be obliged if you will let us have full particulars and characteristics of 'Chrystalite' or 'Barex.' Also we shall be obliged if you will let s have your lower prices for 1, 2, 3, 4 and 5 ton lots and your annual contract rates.

We have been using a certain type of mineral for some time past and have not found it completely satisfactory, and as we shall be placing an order in the very near future we shall be obliged if you will let us have this information at your earliest convenience."

Matters worsen when the law is found to say one thing and mean another. Take the statutory rule that an "assignment"—i.e. a transfer—of an IP right is "not effective" unless it is in writing signed by the assignor or his agent. That is how the copyright provision reads,¹⁴ and the formula is repeated—although with frustrating variations and additions—in the other IP statutes.¹⁵ Anyway the central point seems clear enough: no signed writing, no valid assignment.

Having understood little else in the statute, the ordinary reader would finally fall upon something solid: what is not effective must be inoperative, of no force, null and void. But he would be fooled. For a non-complying assignment *is* effective, just a little less so than had it been in a signed writing. One can validly transfer IP rights orally: the assignee gets an interest that he can transfer; he can get pretty effective relief against an alleged infringer through an interim injunction; and he can go get a court order to have title vested in him if the assignor refuses to sign. True, until then, he cannot get compensation from an infringer, and may be dispossessed in favour of a good faith second buyer who gets a written assignment from the crooked or forgetful transferor. But all this is far from saying that only a signed assignment is effective as a transfer.¹⁶ We end up with a set of hidden parallel interests in IP that may co-exist even with interests that appear on the public IP registers.

None of this law is found in any IP statute. Any judge who said these consequences flowed logically from the provision that an unwritten assignment is "not effective" would be rightly told off for overstepping his role as an interpreter, not remaker, of the law. Judges cannot rewrite a statute that says "A cannot be done" to say "A can be done," any more than a version of the Ten Commandments that omits the "nots" means the same as one that includes them, however much one may prefer the "not"-less version.

But judges are not so unsubtle as to say that "no" means "yes". Whence then comes this edifice of rules of validity they have erected, brick by brick, over the years? From equity—not equity in the loose sense of doing what is fair, just and reasonable (as the tautology goes), but in the technical sense of the rules and principles derived from the powers exercised since medieval times by Lord Falconer's and Mr Straw's predecessors, the Lord Chancellors. Equity in that sense is law's antidepressant, its Prozac. It's what lifts the spirits as one wrestles with the rigours of regulations. It's what makes lawyers feel they are earning their money when they tell clients that a statute can insist all it likes on signed documents, but not having one doesn't really matter much. It's what lets judges sleep the better sleep after having that day regularised an informal deal and stopped a rogue from making off with something for nothing.¹⁷

¹⁴ CDPA s.90(3).

¹⁵ e.g. the formula in PA s.30(6) uses "void" instead of "not effective" for an unsigned transfer, and adds that mortgages and assents by personal representatives of a deceased's estate should be in writing too. The CDPA is silent on the latter two points.

¹⁶ *R Griggs Group Ltd v Evans* [2005] EWCA Civ 11, aff'ing [2003] EWHC 2914 (Ch); *Lakeview Computers Plc v Steadman* [1999] EWJ No.6192, 1999 WL 1048310 CA at [22] CA (Civ Div).

¹⁷ Equity-less Scottish courts may reach a similar result by recognising a personal right in an informal assignee to have the transfer perfected: *Tayplan Ltd v D & A Contracts* [2005] CSOH 17 at [19]–[20] and [25].

But, like Prozac, equity has its side-effects. One is mystification; another is suppression of solutions to the problem it seeks to solve.

MYSTIFICATION

The inaugural professorial lecture of my commercial law colleague at Oxford, Andrew Burrows, was entitled "We Do This at Common Law But We Do This in Equity".¹⁸ In it he deprecated a system in which the common law and equity coexist incoherently, where a common law rule says one thing while an equitable rule says another, such as when a contract insists that something must occur by December 25, but equity says January 1 will do fine too.¹⁹ Professor Burrows argued for a single fused system of rules that synthesised these opposing tendencies into a single consistent policy. This was no radical idea: Lord Diplock and others had advocated it judicially 25 years earlier,²⁰ but progress has been glacial.

Burrows's criticism extends equally to equity and legislation. Equity should not just lurk coyly in the margin of the IP statutes. Its rules should emerge into the open and become part and parcel of the statute, instead of operating to stand words on their head. I do not suggest that equity be repelled altogether, but rather that critical rules such as who owns what should be clearly expressed up front in the legislation. They should not have to be found by grubbing or googling around for obscure statements in the case law. Equity should continue as the occasional aspirin, not the daily dose for a chronic structural defect.

SUPPRESSING SOLUTIONS

Keeping equity hidden in the wings has the further side-effect of suppressing the possibility that other, perhaps better, solutions to the problem of non-complying transfers exist. For example, the United States also requires a signed document for most IP transfers and exclusive licences. Again, the legislation says little about non-compliance but US courts have taken writing more seriously than have the English courts. Perhaps this approach more accurately reflects American norms of doing business, especially in the movie sector, where everybody knows the importance of putting deals in writing to avoid the industry's creative impulses spilling over into the version of events participants are prone to produce after the fact. In the United States, the informal assignee who pays for a copyright work typically gets a mere non-exclusive licence. The courts consider any greater relief would undercut the writing requirements

¹⁸ Andrew Burrows, "We Do This at Common Law But We Do This in Equity" (2002) 22 Ox. J. Leg. Stud. 1.

¹⁹ Burrows, "We Do This at Common Law" (2002) 22 Ox. J. Leg. Stud. 1, 6-7: "If we are to take fusion [of law and equity] seriously, what is needed is a change in the law, albeit often only a small change so as to produce a principled product which may combine elements of law and equity."

²⁰ *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904 HL.

of the US Copyright Act, which, like the CDPA, allows non-exclusive licences on a word or a handshake. The result is that buyers get to use the material as the parties intended but sellers retain the copyright in their inventory to reuse and relicence or formally assign (subject to the licence) as they want.²¹

Whether that approach might be considered for Britain is beside the point, which is that the covert existence of relaxing rules of equity that skulk behind the statutes deflects thought from alternative palliatives for informal deals. That thinking would more likely occur if the rules were exposed to the public light of legislation.

THE LAW MUST BE JUST

Are our IP laws just? Justice involves considering who benefits or should benefit from the law, and whose liberty is restricted or otherwise affected. Our IP laws do not measure up well on this score.

Is there any doubt that, were we designing from scratch a legal structure that aimed to encourage the production of knowledge and innovation, to facilitate the wide and efficient distribution of the results throughout society, and to encourage follow-on knowledge and innovation, we should not likely have devised what we have now?

Would we have decided that virtually every private or business letter, email and text that we or our children produce should automatically be protected worldwide from being copied or electronically forwarded for 70 years after the death of the writer?

Would we have ensured that any store or parts catalogue, any advertisement, any drawing more complex than a line drawn with the aid of a ruler, any combination of four notes, any scrap of haiku or toddler's finger painting, any snapshot taken with a mobile phone camera, was protected for the same period as the 20-volume set of the *Oxford English Dictionary*?

Would we have decided that computer programs needed protection from copying for the life of the programmer plus 70 years, the same protection as for the latest iteration in the Harry Potter series?

Could we, honestly and sanely, have said that these items would not be produced or made available at all if society did not hold out a guarantee against their being copied at all? Would texting, mailing, daubing and programming grind to a halt?

And suppose the computer programmer had come back and said credibly, no, she wouldn't have produced the program without a guarantee against copying by freeloaders: united as we all likely are on the desirability of encouraging more and better programming and programmers, so we can keep on texting and mailing ever more and ever faster, might we not have then asked the fairly obvious question: "How long do you need that protection to last?"

If the reply was, "Long enough for me to recoup my production costs and make a decent return, for why else would I bother?", would we then, sanely, have said, "Well, how about a century, or century and a half?" Could our programmer credibly persuade

²¹ *Effects Associates Inc v Cohen* 908 F.2d 555 (9th Cir. 1990).

us that she would refuse to enter any enterprise that would turn a decent profit only until decades after her death?

Would we have believed her if she said she would not bother writing programs at all and would just pursue the contemplative life, unless everyone else in the world was stopped for 20 years from coming up with the identical idea for a program independently and marketing it in competition with her; and, moreover, that she would not reveal her program code even for that assurance? But trust her: she wouldn't program at all unless she had that promise of 20-year exclusivity on top of society's century-plus promise to stop others from simply copying.

These are some of the results under the system we currently have "designed" to protect IP. For the objects noted, protection under the CDPA as an original literary, musical or artistic work runs for the life of the author plus 70 years. Besides getting her century-plus copyright protection, the computer programmer will also be often entitled to patent her program for 20 years if she shows it to be new, unobvious and doing something technical like making the computer run better—even though the PA bans patents for computer programs "as such".²²

One could pose questions such as these across the whole range of IP law and find, rather more than one ought, that IP law's length and extent of protection seem to be inversely proportionate to the actual need for them.

Again, why is it so? The seed of the mischief lies in the notion found most explicitly in the European directives on copyright. Their Recitals typically include some boilerplate such as the following: "a high level of protection" is needed for copyright and neighbouring rights to ensure "the maintenance and development of creativity in the interests of authors, cultural industries, consumers and society as a whole",²³ and harmonisation up to the highest level within any Member State should be the goal of European policy in this field.

These assertions, which logically lead to broad protection in perpetuity, lack respectable empirical foundation, despite their instrumentalist claims. The proposition that it is in the interests of consumers to keep off the terrain or continue to pay well above marginal cost for a product for perhaps 100 to 150 years after it was first produced, when the same product would have been produced under a regime with a shorter period of protection, is either disingenuous or dishonest.²⁴

It was this malaise that underlay the judges' puzzlement in the Case of the Literary Letter. What are lawyers doing claiming copyright in letters anyway? Judges, even if non-expert in IP, are experts in producing and handling legal correspondence. Experience told them that few lawyers need copyright as an incentive to write as best

²² *Symbian Ltd v Comptroller General of Patents* [2008] EWCA Civ 1066, where so much is read into "such" that the statutory ban on patents for virtually all programs becomes a ban on *refusing* patents for virtually all programs. In mitigation, the European Patent Office does the same too.

²³ Recital (10) of Directive 93/98 of October 29, 1993 harmonising the term of protection of copyright and certain related rights; similarly, Recital (9) of Directive 2001/29 of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive).

²⁴ This and the previous paragraph are drawn from D. Vaver, "The Copyright Mixture in a Mixed Legal System: Fit for Human Consumption?" [2002] *Jur. Rev.* 101, 114; (2001) 5(2) *E.J.C.L. Part V*, at <http://www.ejcl.org/52/art52-3.html> [Accessed March 19, 2009].

he or she can.²⁵ Moreover, it was not really the lawyer complaining at all: it was the manufacturer, who had got the lawyer to agree to transfer title to it and wanted to censor the distributor.

Now of course the CDPA did provide the uploader with a defence of sorts: he could copy the work to criticise it if he dealt fairly with it, i.e. copied no more of the letter than was necessary for criticism (often a tricky question of judgment), and included the source of the letter and the author's name (which were probably evident from the letter itself). But since 2003 even this defence has disappeared for private letters: an amendment, required by a European directive, now restricts fair dealing here to cases where the work is "made available to the public" with the copyright owner's consent.²⁶ The typical lawyer's letter would not meet that requirement.

What is interesting is that the judges decided to bypass the fair dealing defence as "an impoverished means of considering these questions". Buxton L.J. wondered whether:

"... when a person causes his solicitor to write a letter of this sort, he [gives] an implied consent to its publication by the recipient that goes more widely than the very narrow limits that apparently are presently recognised by the law of copyright. That consideration might well be further informed by reflecting on the position of this part of the law of copyright in relation to Art.10 of the European Convention on Human Rights [i.e., the right of freedom of expression]."²⁷

The judge sensed, I think correctly, that copyright law had become unbalanced: it had gone too far in protecting things and not far enough in providing defences against overreaching. Perhaps in York they talk of little else than implied consent and art.10 of the ECHR, but I doubt if anyone could satisfactorily explain to that retailer in York how a just copyright law can fail to deal crisply and fairly with the everyday act of uploading material on to a website to criticise or expose what was happening to a website holder. A law that has to be got around by the fiction of implied consent and the sledgehammer of human rights law is exposed as one that forgets to protect the expression of everyone except the little class of people it designates as authors and their employers and publishers.

²⁵ Perhaps not all lawyers' letters should necessarily be excluded as a class from protection. Some need careful thought and crafting beyond the routine reflex letter before action. Some run as long as a short story. The routine writing should be unprotected for lack of originality (contrary to the present position); the non-routine may be original and protectable, although not for the absurdly extravagant period of the writer's life plus 70 years. In some cases, all the lawyer might really want or need is that the copier attribute him as the source, i.e. acknowledge the lawyer's moral rights. For either copyright or moral right infringement, originality should require a finding that so much skill and thought went into how the letter was expressed that unattributed copying significantly harms the first writer.

²⁶ CDPA s.30(1), implementing art.5(3)(d) of the Information Society Directive; *Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch) at [162] *et seq.*, *aff'd* [2006] EWCA Civ 1776.

²⁷ *Musical Fidelity* [2003] F.S.R. 50 at [29]–[30], although he nevertheless dismissed the appeal since these points were not taken before the lower court or argued on appeal.

THE LAW MUST BE EFFICIENT

Laws that are unclear and can operate unjustly are usually inefficient as well. Unclear laws make people take costly measures to put clear water between their activities and the law's potential reach, or else they just end up unwitting victims. Unjust laws not only cause more disputes; the disputes tend to go on longer as people wrestle against the results the law apparently imposes on them.

Our IP laws are a product of our history. Apart from the occasional hiccup and exception such as for trade secrets and passing off, there has been no common law of IP since the end of the 18th century. IP rights depend on legislation.²⁸ Although practices relating to what we would now call IP predate the first IP statutes, our patent laws spring from early 17th-century statute law, our copyright law from a statute a century later, our design laws from later in the 18th century, and our trade mark registries from Victorian legislation. They and the enactments that amended and replaced them over the years all protected or encouraged particular activities, but their ensemble did not then and does not now amount to any coherent national policy on enterprise and innovation. Such a policy involves more than IP law, but IP law is an important component.

To be fully effective, IP laws must be consistent within and among themselves. They must, in the jargon of the bureaucrat, be joined up. Currently they are not. Instead they bring to mind how one critic described Ralph Waldo Emerson's verse: "Roots, wood, bark, and leaves singly perfect may be,/ But, clapt hodge-podge together, they don't make a tree."²⁹ A hodge-podge is what we have, and not even one that is singly perfect. How to make a tree out of it all?

What follows is the beginning of a reform plan. It can be enacted in stages, starting with the dulllest, most technical and least controversial of reforms, and progressing to more challenging fields.

First, the rules on IP acquisition and management—co-ownership, transfer, licensing, registration—need to be rationalised. The rules should be clear; they should also be identical, unless there is a good reason why not. If they are meant to be identical, the same language should be used to confirm identity.

The IP laws offend all these precepts, for no discernible reason other than that they were drafted by different hands at different times. Standardisation here is important if for no other reasons than that what IP an activity attracts may be pure happenstance, and that IP rights are often transferred as a whole. The costs of drafting, due diligence and insurance unnecessarily go up where standardisation is absent.

As to initial ownership: authors, inventors and designers *prima facie* first own what they produce; but beyond that everything else differs. Labelling IP owners consistently may seem a trivial point but it nevertheless illustrates the depth of the problem. Take

²⁸ *Donaldson v Beckett* (1774) 2 Bro. Parl. Cas. 129 HL; *Jefferys v Boosey* (1854) 4 H.L. Cas. 815, 10 E.R. 681 at 736, 738–741 and 744–745, denying common law right to prevent copying of inventions or published works of art or literature; H. Abrams, "The Historic Foundations of American Copyright Law: Exploding the Myth of Common Law Copyright" (1983) 29 Wayne L. Rev. 1119; R. Deazley, "The Myth of Copyright at Common Law" (2003) 62 Camb. L.J. 106.

²⁹ J.R. Lowell, "A Fable for Critics" in G. Moore, ed., *The Penguin Book of American Verse* (rev. edn, 1989), p.111.

designs: the owner of an unregistered design under the designs part of the CDPA is called an "owner"; if the design is registered under the Registered Design Act 1949 (RDA), he becomes a "proprietor",³⁰ if he has a registered or unregistered design under the Community Design Regulation, he is called a "holder". Design rights can be held concurrently under these three Acts, so transfers presumably need, untautologically, to refer to the transferor as the owner, proprietor and holder, and to the act as a transfer of proprietorship, ownership and holdership of the design right involved. To keep things suitably unstable, one finds that changing who holds a community design involves changing "ownership",³¹ while a PA provision that is headed "Co-ownership" deals with multiple "proprietors" of a patent.³² Whether being an owner differs from being a proprietor or a holder is unclear; only an appellate decision can tell us for sure.

As to employees: they universally lose their rights to their employer if they produce work as part of their employment, but again the formula differs between IP rights. For one right, the employer is the owner if the employee did the work "in the execution of his duties or following the instructions given by his employer"³⁴; in another, he is owner if the employee's work is done "in the course of his employment".³⁵ In one, copyright, these provisions apply "subject to an agreement to the contrary",³⁶ but this phrase does not appear in the design right provisions—which raises the question whether or not one can contract out of the proprietorship or holdership provisions of design rights at all, and if so, how? Can one proceed as for copyright and contract out not only by a signed writing but also expressly, impliedly or even orally? Or is an express writing signed by the holder/proprietor/owner required, as for other transfers?

To cap matters, the PA has an elaborate set of rules about the ownership of employee inventions that are said to take effect "notwithstanding anything in any rule of law".³⁷ How far these rules mirror those for copyright and designs is unclear. The "notwithstanding" language suggests it an exhaustive statutory code that ousts the common law rules on employment and ownership.³⁸ It may not differ much, but how much and in what respects is unclear.³⁹ An employee may create material that attracts any and all sorts of IP rights, and a policy that varies the default or vesting rules for ownership depending on which right, after the event, is found appropriate needs, at the least, some clear justification. I know of none.

³⁰ So too for registered trade marks under the Trade Marks Act 1994: see, e.g., s.14.

³¹ CD Reg art.16.

³² PA s.36; but see the dictum in *Thorn Security Ltd v Siemens Schweiz AG* [2008] EWCA Civ 1161 at [71]: "The 1977 Act does not define the term 'proprietor', but, by inference he is the person who owns the patent."

³⁴ Community Design Regulation art.14.

³⁵ RDA s.2(1A); CDPA ss.215(1) and (3).

³⁶ CDPA s.11(2).

³⁷ PA s.39.

³⁸ *LIFFE Administration & Management v Pinkava* [2007] EWCA Civ 217 at [91]–[92]; similarly, *Yeda Research & Development Co Ltd v Rhône-Poulenc Rorer Int'l Holdings Inc* [2007] UKHL 43 at [18], on the right to apply for a patent (PA s.7), which states to whom a patent may be granted "and to no other person".

³⁹ *King v South African Weather Service* [2008] ZASCA 143 at [14], a computer program case, where the court thought that application of the PA and ordinary copyright rules on employee work produced different results.

It would be tedious to set out the similar disparities on co-ownership, transfer, licensing and registration between IP rights. But they exist in spades and raise similar costly conundrums of interpretation. Very recently, the Court of Appeal mildly chided a High Court judge for his "fault"—its word—of being too logical in analysing the PA's written assignment provisions. He should have rummaged yet more through the Act and preliminary government studies for further clues on whether to go beyond his merely "deductive exercise based on close examination of the precise words that Parliament has used". Had he properly performed that exercise, the court said, he should have reached the opposite result.⁴⁰ The Court of Appeal's methodology, while admirable as exegesis, is no tribute to the drafting of the provisions. Nor does it settle the consequential question whether the counterparts in the other IP statutes should result in the same interpretation because their different wording may, after internal and external cross-checking, produce a different result. It is hard to accept that something as fundamental to IP as who owns it has, in the 21st century, to be ascertained by processes as tortuous as these.

Secondly, more generally, all IP rights should be consolidated into a single code. Disparities in language across the statutes would be removed, and the language would be made more user-friendly. This process would also help flag problems with the existing rights. Some might be remediable within the United Kingdom; others may require more EU, WIPO or WTO support. This will be true, for example, if we wish to argue for changing how long some of these rights should run, currently way beyond any period justified by the need for incentives or any reasonable claim to fair treatment.

A consolidation exercise would reveal that many IP rights can be held cumulatively. Designs are the most notorious: four statutory schemes at UK or EC level protect them, besides potential protection under trade mark and passing-off law. Genetic modifications to plants can get both patent and plant breeder right protection, depending on whether the gene crosses varieties or applies only to a single one; they may also get perpetual protection as trade secrets against someone who hurdles the fence by night, takes cuttings and grafts them on to his own rootstocks.⁴¹ A firm's logo may be registered as a trade mark and protected under the law of passing off; a computer program can be protected by a patent; and yet copyright protection for both the logo and the program is often available on top of these other protections. Owner and user rights differ under these regimes, but the IP owner may rely on whichever suits him best: users have no say.

All this is a debatable policy, for multiple protection is usually overprotection. If material is adequately protected by trade mark law, why stretch copyright law to protect it more? If the same creative process is protected by both patent and copyright,

⁴⁰ *Thorn* [2008] EWCA Civ 1161 at [89], upholding patent transfers arising from the regular filing with the Swiss Commercial Registry of a written merger of Swiss companies, even though the assignment flowed from the filing rather than the earlier agreements, and allowing the assignee to recover post-assignment damages for infringement. The Court of Appeal found "internal and external clues" (including a passage in the Banks Committee's Report on the Patent System in 1970) that suggested a broader meaning of "assignment in writing" that included the Swiss transaction.

⁴¹ *Franklin v Giddins* [1978] Qd.R. 72.

why should the copyright not be forfeited if a patent is voluntarily acquired.⁴² If a design right or product patent expires, why should the possibility even exist, as it does now, of having additional potentially perpetual trade mark protection on the product shape, a right even more potent than protection by patent or design right?

If overlap of rights is permitted for owners, why should it not be permitted equally for users? If a user has a right of fair dealing with a copyright logo under copyright law, why can he not claim this right if sued for trade mark infringement of the logo? Sauce for the owner goose should be sauce for the user gander too.

Perhaps we need to return to a system where each IP right is "kept firmly within its legitimate bounds".⁴³ We can set these boundaries more clearly when the rights are housed in the same statute. Where we want overlap, we can more easily prescribe the conditions for it.

Thirdly, the process of consolidation will reveal that much of our IP exists outside the statutes. It comprises trade secrets, know-how and other confidential information. Nobody knows the total value of this IP, except that it must be enormous. Many patents are less valuable or even valueless without the patentee's know-how on how best to exploit the invention, and that know-how typically is not disclosed in the patent. Some firms deliberately decide not to patent, especially if the innovation is a process that can be kept secret indefinitely: perpetual control over the secret is more valuable to them than getting a time-limited patent. There are risks in this strategy—e.g. someone will come up with the same invention elsewhere and patent it, or the secret will be publicly disclosed by some disaffected employee—but these risks may be manageable or acceptable. There is a serious policy question whether or not such trade secret protection should be extended to unpatented but patentable information. But that is only a small part of the problem with trade secret law.

We have a TRIPs obligation to protect trade secrets, but whether the protection the United Kingdom currently offers complies with TRIPs or not is unclear. The operative word here is "unclear": the whole law of trade secrets is unclear because it remains judge-made and thus comprises an ever-growing, ever-shifting accumulation of precedents running back to the time of Queen Victoria and beyond. The action was developed in chancery and remains equitable, but what is its basis: unjust enrichment? Good faith? Unconscientious behaviour? Or something else? How novel, original or definite must a secret be to get protection? What relief attends a breach? Should good faith purchase or change of position be a full or partial defence? Getting answers to such questions is akin to biblical exegesis, except if the lawyer gets it wrong only his client will excommunicate him. How courts will decide a dispute, even after all the facts are in, is quite unpredictable.

⁴² Such a suggestion in *Korzybski v Underwood & Underwood Inc* 36 F. 2d 727 (2d Cir. 1929) was said to be not the "orthodox assumption": *Roland Corp v Lorenzo & Sons Pty Ltd* (1991) 22 I.P.R. 245 at [24], aff'd (1992), 23 I.P.R. 376 Aust. Full Fed. Ct.

⁴³ *Beecham Group Plc v Triomed (Pty) Ltd* 2003 (3) S.A. 639 at 643 SCA, denying registration of trade mark to a pill that had come off-patent; see also W. Cornish, "Cumulation and convergence of intellectual property rights," in P. Mirfield and R. Smith (eds.), *Essays for Colin Tapper* (2003), p.200; V. Moffat, "Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection" (2004) 19 Berkeley Technology L.J. 1473.

This messiness has its price. The prevailing view in the United Kingdom is that trade secrets are not technically property; so on what basis do they appear as assets on a balance sheet? On what basis are they licensed? On what basis, if any, may the "licensee" claim against someone who nabs the secret from the "licensor"—at least where the nabber is not *Hello!* magazine, the licensee is not its rival *OK!*, and the "trade" secret is not the wedding ceremony of Michael Douglas and Catherine Zeta-Jones, for the exclusive publication rights of which *OK!* paid \$1 million?⁴⁴ Keeping the field judge-made also prevents English firms which are harmed by a foreign pilferer of their trade secrets from suing him in England, even though their English interests are injured. English courts have jurisdiction here only over torts or delicts, and breach of confidence is an equitable action, not a tort. The injured firm must follow the absconder into the courts of his domicile.⁴⁵ Only legislation can reverse the entirely historical and outdated classification of the action, and put English courts on a par with Scottish courts that can take such cases.⁴⁶

The Law Commission produced, after a long period of gestation, a useful outline for a statutory code in 1981,⁴⁷ and almost every state in the United States long ago enacted a Uniform Trade Secrets Act. So should the United Kingdom, under the umbrella of the IP code I propose.

Fourthly, there is a need for a registry for IP rights, including copyrights and trade secrets. Stationers' Hall used to have a copyright registry where registration was mandatory a century ago, and such registries continue in North America and elsewhere. Registration must now be optional for copyright because of a Berne requirement that requires copyright to arise automatically, and TRIPs too may impliedly require trade secret protection without formality. But strong arguments exist for such an optional registry. The costs of proving and securing title would be reduced, as it is for other IP rights. Occasions arise where people deal with someone who turns out not to be a copyright owner; they end up paying twice or more, or become liable for the full consequences of infringement just as if they were a deliberate infringer. Sometimes it is only in court that the lack of title is revealed, as happened in the *Lawyer's Letter* case.⁴⁸

⁴⁴ *OBG Ltd v Allan* [2008] 1 A.C. 1; [2007] UKHL 21, allowing *OK!* to recover damages from *Hello!* for publishing photographs of the wedding contrary to the contract for exclusive photography rights the Douglasses had granted *OK!*.

⁴⁵ *Kitechnology BV v Unicolor GmbH Plastmaschinen* [1995] F.S.R. 765 CA (Civ Div) at 777–779, on the Brussels Convention on Jurisdiction and Enforcement of Judgments 1968. The court saw no logical reason why a wrong that harmed an English company in England should not be pursued here. If a document containing the trade secret had been stolen, suit could have been brought in England because conversion is a tort applicable to the taking of tangible things: *OBG* [2008] 1 A.C. 1 (majority). Whether, by analogy with conversion of a cheque, damages would be calculated on the substantial value of the secret rather than the trifling value of the paper on which it appeared is, however, uncertain.

⁴⁶ In equity-less Scotland, breach of confidence is a delict.

⁴⁷ *Breach of Confidence*. Cmnd. 8388. Law Com. No.110, 1981. Improvements were suggested by F. Gurry, *Breach of Confidence* (1984), Appendix II.

⁴⁸ It emerged only during the oral hearing that the copyright owners in the letter were probably the lawyers themselves since they were not employees of the manufacturer. The court was willing to accept an undertaking that the lawyers, who were not parties to the litigation, would promptly assign their copyright to the manufacturer. Not all courts are as indulgent. Some might have struck out the proceedings as wrongly constituted, since the manufacturer probably had no right to compel the

A registry would also give make these rights and dealings in them more transparent. Only rights that were thought valuable and exploitable would in practice be registered.

Fifthly, even if the above proposals, designed to simplify IP law structurally, are accepted, we may still be left with necessary complexity, i.e. many reasonable people will be unaware that items are IP-protected or that their acts constitute infringement. The Lawyer's Letter case is one such instance; cases involving patent infringement are others, where questions of validity and infringement are often difficult and give rise to disagreements even among specialist judges.

Honest ignorance of the law or facts is no excuse to infringement, except in the narrowest of cases; and few slip through the eye of that needle. All infringers are liable to be enjoined, but even honest ones can end up being liable for large sums in compensation.

This attitude requires revisiting. It took hold at a time when IP rights were far less extensive and intrusive than they are today. The Lawyer's Letter case is symptomatic of widespread public ignorance about copyright's recent enormous expansion; predicting the outcome of patent cases is also close to soothsaying. If experienced appeal judges can be surprised in such cases, why should lesser mortals be held to higher standards? We should consider honest ignorance as a partial defence. A claimant would always get his injunction and costs, and of course if the infringer continues infringing after he is given a reasonable time and opportunity to investigate the claim, he might then be at risk of being liable from then on for the ordinary consequences of infringement: damages, account of profits and the rest.

Sixthly comes the question of balance in IP law and how that should be integrated into the proposed code. Statements that IP is designed so as to balance the interests of IP holders against the interests of IP users are legion. IP law is therefore not just the law of IP holders; it is the law of IP users.

The rhetoric nevertheless persists that what users may do in relation to protected items constitute "exceptions" to or "limitations" on the control rights of owners. This usage is endemic to TRIPs and the recent WIPO treaties. It is a style of language that certainly suits IP owners but its effects are pernicious. It treats what owners can do as rights (with all that word connotes), and what everyone else can do as indulgences, aberrations from some preordained norm, activities to be narrowly construed and not extended. The metaphor of balance cannot sensibly work from such a starting point: how can rights be balanced against exceptions? The scales already start weighted on one side.

The way out of this linguistic hole is easy enough. Since a use that falls within an exception or limitation does not infringe the owner's right, that right must stop at the point where a user can lawfully act. "Exceptions and limitations" define the outer limits of the owner's rights. Owners cannot control acts in this territory because their rights do not run there. What owners cannot control, users must be able freely to do. If we are

lawyers to transfer copyright to him, and so could not have brought the copyright proceedings at all without the lawyers' voluntarily agreeing to sign over a transfer.

to balance like against like, what acts users may do must themselves be treated as their rights; these rights can then be balanced off against the rights of owners.⁴⁹

Thus can compromises be fairly struck when policy is formulated and resulting laws are interpreted.

Such an approach in an integrated code would have us decide what activities people should be free to pursue outside the reach of IP rights. Policy here is currently incoherent. Not only is the same sort of standardisation across rights sorely needed as was proposed for IP acquisition and management, but a more standardised substantive policy also needs to be developed across rights. Consider the following random examples among many that could be chosen:

- One can experiment on patented subject-matter for both commercial and non-commercial purposes,⁵⁰ but reproducing copyright material for research purposes for a commercial purpose is infringement.⁵¹ Even if we assume, probably wrongly, that the words “research” (in the copyright law) and “experiment” (in the patent law) are synonymous, copyright and patent policies do not gel. We proclaim research and experiment as the lifeblood of innovation and the way forward for our economy, while simultaneously stemming that lifeblood immediately a business gets involved in research that handles copyright material.
- In the Lawyer’s Letter Case, the Human Rights Act had to make an appearance for a right of criticism to be applied beyond the reach of copyright. Presumably a right to parody, currently lacking from the IP laws, would have to rely on that Act too.⁵² To resort to human rights to trump IP laws shows how badly IP accommodates basic human values that themselves stem from commonly accepted practice in democracies. IP law must do better by spelling out those rights endogenously in a better balanced IP law.
- The need for better balance at the micro level too is shown up by questions such as whether or not IP rights are infringed when vessels enter our waters or

⁴⁹ This approach is backed by a decision of the Canadian Supreme Court, *CCH Can. Ltd v Law Society of Upper Canada* 2004 S.C.C. 13. The court declined to analyse fair dealing as an exception even though the relevant provision appeared in a part of the Copyright Act headed “Exceptions”. Instead it adopted a concept of “user rights” that formed an integral part of the balance that produced the copyright system. The Chief Justice said for a unanimous court (at [48]):

“[T]he fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it must not be interpreted restrictively. As Professor Vaver has explained . . . ‘User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.’”

⁵⁰ PA s.60(5)(b).

⁵¹ CDPA s.29(1), as amended (although with changed wording) pursuant to art.5(3)(a) of the Information Society directive.

⁵² *Éts. Michelin et Cie v C.A.W.-Canada* (1996) 71 C.P.R. (3d) 348 (Fed. T.D.), holding parody is not “criticism” under the fair dealing provisions of the Canadian copyright law; cf. *Laugh It Off Promotions CC v South African Breweries Int’l (Finance) BV* 2006 (1) S.A. 144 (Const. Ct), allowing parody as a free speech defence to trade mark infringement.

aircraft enter our airspace. Different answers are given, depending on the right involved.^{52a} What sense does this make in policy terms?

CONCLUSION

I have avoided dealing with the question of how such reforms might be practically implemented. The first step is always to think about goals before moving to ways and means. My proposals are a first step. Much more needs to be done to develop and make them politically attractive, and to demonstrate their real benefits to the sectors which IP law reform affects. Action at the European and international level may also be needed, for the EC directives and regulations suffer from many of the same defects as the UK statutes. Their enactors have to do better.

In concluding my inaugural lecture at Oxford some years ago, I said:

“... [F]or the intellectual property system to survive, it must gain and keep public respect. To be respected, it must be known. To be known, it must be understood. To be understood, it must be coherent and persuasive. There are now calls that the public should become better educated about intellectual property. Such calls are, naturally, music to the ears of any educator. But one must be prepared for the consequence that an educated public is entitled to demand greater coherence and persuasiveness from the intellectual property system than that system presently exhibits. If those calls are not met and answered, then greater knowledge will not produce greater public respect, but instead cynicism, disregard and avoidance.”⁵³

The outline for an IP code presented above may be a useful step towards IP's regaining some of the respect it has lost over the years.

^{52a} Compare PA s.60(5)(d)–(f) with RDA s.7(2)(d)–(f), and no corresponding provisions in the CDPA.

⁵³ D. Vaver, “Intellectual Property: The State of the Art” (2000) 116 L.Q.R. 621, 637.